(2)

No. 90-876

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROLANDO THOMAS ALAYON,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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QUESTIONS PRESENTED

1. Whether the actions of the police officer at Petitioner's doorway, including a warrantless entry, were constitutionally permissible when based upon facts sufficient to establish a reasonable suspicion of criminal activity or probable cause to arrest, accompanied by exigent circumstances.

2. Whether a protective sweep of the premises for the purpose of preventing the destruction of evidence and securing the premises pending a search warrant is a violation of the Fourth Amendment and/or an unconstitutional extension of *Maryland v. Buie*, 494 U.S. ——, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990).

3. Whether the search of the premises based upon the voluntary consent of a third party co-inhabitant was in violation of the Fourth Amendment.

4. Whether the statements made by Petitioner were obtained in violation of his constitutional rights when he was given an adequate *Miranda* warning, knowingly waived those rights, and voluntarily confessed to distributing and possessing cocaine.

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STATEMENT OF CASE

The following is extracted directly from the opinion of the Minnesota Supreme Court in *State v. Alayon,* 459 N.W.2d 325 (Minn. 1990) and provides a full Statement of the Case:

> "On March 29, 1989, Sergeant Francis Zaruba, an undercover narcotics officer with the St. Paul Police Department, met with two men, one of whom was later

identified as Robert Laynugh. They went to an alley at the rear of a residence at 1092 East Rose on the East Side. Laynugh went inside and returned with a man later identified as Murl Jones. Jones said his nearby source of cocaine was "out" and that they would have to go to the West Side. He directed them to meet him in 20 minutes at the parking lot at Awada's on Plato, east of Wabasha. When Zaruba and his party arrived at Awada's, they were met by Jones, who was with a second man, in a Ford LTD. Jones told Zaruba that they wanted the money for the cocaine (1/8 of an ounce) "up front." Zaruba refused. Jones said the price would then increase from $225 to $250. Zaruba finally agreed to pay $235. Jones and his passenger, later identified as Jose Espinoza, then drove off. Other undercover officers who were on surveillance detail followed the LTD to an area about 3/4 to 1 mile away. One of the officers, Carter, saw Espinoza exit the car and walk to a residence on East King. From his vantage point, Carter could see only that Espinoza went into one of two houses, either the one at 81 East King or the one at 83 East King. Espinoza returned to the LTD a short time later, and Jones and he drove back to Awada's, where the exchange of cocaine for money took place. Jones gave some of the money to Laynugh and then left with Espinoza.

The next day, March 30, Zaruba called Jones at Awada's and discussed buying an ounce of cocaine for $1,500. Jones agreed to meet with him in the lot at Plato and Robert that afternoon. Accompanied by Berg, a female undercover officer, Zaruba drove there and pulled up next to Jones and Espinoza, who were in the LTD; Espinoza had a child with him this time. Jones

again said that they wanted the money up front, and Zaruba again refused. Jones offered to let Zaruba ride with them to an undisclosed location, but Zaruba said "no." Finally, they agreed that Zaruba could follow them to the area. When they arrived at Stevens, just south of Livingston near East King, Jones again asked for the $1,500 up front. Zaruba said "no," but gave Jones $50 up front as a gesture of good faith. Espinoza then walked south on Livingston to King, where he turned left and began walking east. Carter, in his surveillance position, knew that Espinoza entered and exited from either 81 East King or 83 East King. His "best guess" was that Espinoza entered 81 East King, a house with a porch and the front door blocked by pillars; he felt that, had Espinoza entered 83 East King, he would have seen the unblocked screen door open and close.

When Espinoza returned 5 minutes later, he first got into Jones's car. Then Jones took the cocaine to Zaruba. Zaruba, who was "bugged," gave a prearranged signal, and the surveillance officers moved in and arrested both Jones and Espinoza. After asking Espinoza what his name was, Officer Neil Nelson, an undercover officer, took the $1,500 in cash and walked to 81 East King, the house which, according to Carter's "best guess," was the one Espinoza had entered to get the cocaine.

When Nelson knocked on the door, he heard a female voice inside the house describe him to someone else. Then defendant, Rolando Alayon, who apparently is from Cuba, came to the door and opened it. Nelson said that "Jose" (Espinoza) had sent him with the money. Defendant frowned and then glanced past Nelson, looking towards the street. Nelson said that he was "in the car when the deal went down" and that Jose had gotten into a fight

and asked him to deliver the money. Nelson displayed the money as he said this. At that point, defendant nodded his head as if saying yes and started coming outside and closing the door behind him.

Convinced at that point that 81 East King was the house Espinoza had entered and that defendant was connected in some way to the sale, Nelson pulled a gun, showed his badge and ordered defendant to lie down on the floor. As defendant lay down on the threshold and other surveillance officers began approaching the house, Nelson entered the house with the intention of securing the premises and preventing the destruction of evidence by those who were in the house, pending application for the issuance of a search warrant. As part of his efforts to secure the house, Nelson ordered the two women who were seated in the living room to stay seated and then made a brief 60-second "sweep" of the house. He found a male teenager also in the house. Nelson and the other officers then put their guns away and let defendant stand up. Neither Nelson nor any of the other officers either handcuffed defendant or told him that he was under arrest.

Nelson talked first to one of the women, Miriam Montanez. He asked her if it was her house and if she paid the rent. She said "yes" to both questions. Nelson asked her if he could search the house. Nelson denied coercing her or threatening her in any way. She not only said that he could search the house, but also assisted him when the search began. Montanez acted as translator when Nelson spoke with her cousin, Luz Cotto, a 20-year-old woman who lived elsewhere in St. Paul and apparently was just visiting. Before commencing the search, Nelson also spoke

with defendant, who, like Montanez, did not need an interpreter. Defendant said that Nelson could search the house, and, when asked if cocaine was in the house, said it was on top of the cabinet in the kitchen. When Nelson looked inside the cabinet, defendant said, "No, on top."

After finding cocaine there, Nelson gave defendant a Miranda warning and arrested defendant. Defendant asked a number of questions about the warning, and Nelson explained it carefully before obtaining a waiver. Defendant told Nelson about his involvement in the offense and pointed out other items in the house related to drug dealing, including a scale and another bag of cocaine, a bag which defendant said that Espinoza had left as collateral because Espinoza had not paid him yet for the ounce sold to Zaruba. Defendant said that he had sold the cocaine to Espinoza for $600. He said that the scales and cocaine were his, not Montanez's or her cousin's. Police also found a .22 caliber rifle and a clip in the search of the house. In a search of defendant's person incident to the arrest, they found a large amount of cash.

Defendant was charged with distribution of cocaine, possession of cocaine with intent to distribute, and two counts of failure to affix tax stamps. After the trial court denied defendant's motion to suppress on fourth amendment grounds, defendant waived his right to a jury trial and agreed to be tried on stipulated facts. The trial court found defendant guilty as charged and sentenced him to concurrent terms of 32 months for distribution of cocaine and 21 months for one of the counts of failure to affix tax stamps. The court of appeals reversed all of defen-

dant's convictions, concluding that the trial court erred in denying the motion to suppress. *State v. Alayon*, 454 N.W.2d 629 (Minn.App. 1990). We reverse the decision of the court of appeals and reinstate the judgment on conviction."

State v. Alayon, 459 N.W.2d at 326-328. See also Petition For Writ of Certiorari, Appendix B, P.P. B-2 to B-5.

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE DENIED

The case at bar does not present any special or important reasons why certiorari should be granted. While some Fourth Amendment and other constitutional issues have been presented by Petitioner, they are not unsettled in nature nor do they merit further consideration. Moreover, there is no conflict in decisions present that might warrant review. As will be subsequently shown, the Minnesota Supreme Court did not misapply any controlling principles of constitutional law set forth by this Court.

1. Actions at the Doorway

It is well established that the Fourth Amendment allows the forced temporary detention of an individual based upon an articulable suspicion of criminal activity under a line of cases that started with *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). It also allows warrantless threshold arrests based upon probable cause. *United States v. Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976).

In the case at bar, either of the above standards had been fulfilled when the officer elected to detain Petitioner at gunpoint in the doorway. This is based upon: (1) the surveillance

officer's observations and belief that the drugs from the recently completed transaction came from the house at 81 East King; (2) Petitioner's initial reaction of frowning and suspiciously checking the street; and (3) Petitioner's affirmative head nod upon seeing the money, accompanied by an attempted closing of the door to step outside for further discussion. Under these facts, the Minnesota Supreme Court correctly held that the officer's action in detaining Petitioner at this time was not in violation of the Fourth Amendment.

Contrary to Petitioner's implication, this is not a case where he answered a knock on the door and was immediately detained at gunpoint while officers burst into his home. See Petition, P. 6. Rather, Petitioner's own actions after answering the door demonstrated that he was connected to the cocaine transaction that had occurred just minutes earlier. This decision is also neither contrary nor inconsistent with *Santana*, for that case plainly held that the threshold of one's residence was a public place for purposes of the Fourth Amendment. *Id.*, 427 U.S. at 42, 96 S.Ct. at 2409.

Sgt. Nelson's warrantless entry for purposes of securing the premises pending a search warrant was also not in violation of the Fourth Amendment. While *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), prohibits most warrantless entries, this Court expressly recognized that they are permissible if accompanied by exigent circumstances. *Id.*, 445 U.S. at 590, 100 S.Ct. at 1382. This Court has also recognized that exigent circumstances can be created by the threatened destruction of evidence. See *Welsh v. Wisconsin*, 466 U.S. 740, 750, 104 S.Ct. 2091, 2097-2098, 80 L.Ed.2d 732 (1984), citing *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). Finally, the temporary securing of a dwelling to prevent removal or destruction of evidence

while a search warrant is being sought does not violate the Fourth Amendment when officers have probable cause to believe there is evidence of criminal activity on the premises. *Segura v. United States*, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984).

In this case, the Minnesota Supreme Court used a probable cause plus exigent circumstances test to uphold the entry and subsequent seizure of the premises. *State v. Alayon*, 459 N.W.2d at 329-330. See also Petition, P.P. B-7 to B-9. Probable cause to believe the house may contain contraband was created by the aforementioned facts involving the recent purchase, observations of the surveillance officer, and Petitioner's actions in the doorway. Under Minnesota law, a recent purchase of drugs from a specific location may create probable cause to believe additional drugs may be found on the premises. See e.g. *State v. Cavegn*, 356 N.W.2d 671 (Minn. 1984). Exigent circumstances was created by Appellant's attempt to close the door and the presence of third parties inside the house of whom the officer was fully aware. Once alerted to the events on the threshold, they could easily destroy any remaining evidence. Immediate entry was plainly necessary to prevent this and effectively secure the premises pending application for a search warrant. Contrary to Petitioner's assertions, this case conforms to the holdings of both *Payton* and *Segura*. See Petition, P.P. 8-9.

It should also be noted that the holding in the case at bar is very similar to *United States v. Socey*, 846 F.2d 1439 (D.C. Cir. 1988), *cert. den.*, —— U.S. ——, 109 S.Ct. 152, 102 L.Ed. 2d 123 (1988). In *Socey*, the Court held that officers could make a warrantless entry pursuant to the exigent circumstances exception for the purpose of securing the premises when they possessed a reasonable basis to believe that destruc-

tion of evidence could be accomplished by third parties inside the home. *Id.*, 846 F.2d at 1444-1448. As this Court denied review under nearly identical circumstances in *Socey*, it should also deny review in the present case as well.

2. Protective Sweep

Certiorari is also not warranted because the limited protective sweep that occurred was neither in violation of the Fourth Amendment nor an improper extension of *Maryland v. Buie*, 494 U.S. ——, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990).

At the outset, Petitioner has not been totally candid with this Court regarding the holding in the case at bar. Contrary to his argument, the Minnesota Supreme Court did not hold that ". . . a protective sweep of the premises was permissible absent probable cause to arrest *and* reasonable belief that danger to persons existed." Petition, P. 6. This, of course, creates the impression that the police may make a protective sweep for no reason whatsoever and that would clearly be contrary to *Buie*. That, however was not the conclusion reached by the Minnesota Supreme Court!

Their actual holding was merely that a brief sweep of the house to prevent destruction of evidence, done in conjunction with its impoundment, was proper when the police had probable cause to believe that the premises contained evidence that could be in imminent danger of destruction while they obtained a warrant. *State v. Alayon*, 459 N.W.2d at 330. See also Petition, P. B-9. This result is clearly in conformity with *Segura*, for that case also involved a limited security check of the presence for other occupants when the police lawfully seized the premises pending application for a search warrant. *Id.*, 468 U.S. at 800-801 and 810, 104 S.Ct. at 3383 and 3388.

Moreover, it would be patently unreasonable to say that officers can lawfully seize the premises pending a warrant application, but cannot make a limited protective sweep to round up those inside the house who might destroy the evidence without violating the Fourth Amendment.

The instant case is also not an unconstitutional extension of *Buie*. In reaching its result, the Minnesota Supreme Court expressly noted that *Buie* dealt with slightly different principles (sweep in conjunction with an in-house arrest and for purposes of the officer's safety) and had limited applicability to the instant situation. *State v. Alayon*, 459 N.W.2d at 329. See also Petition, P. B-8. Furthermore, an unconstitutional extension is simply not present when the Minnesota Court used a higher standard (probable cause) than this Court required in *Buie* (reasonable, articulable suspicion). *Id.*, 110 S.Ct. at 1099-1100.

3. Consent Search

A consent search will be valid if the decision to consent was made freely and voluntarily. *Schnekloth v. Bustamonte*, 412 U.S. 218, 222, 93 S.Ct. 2041, 2045, 36 L.Ed.2d 854 (1973). The voluntary nature of a consent is a question of FACT to be determined from all the circumstances. *Id.*, 412 U.S. at 227, 93 S.Ct. at 2047-2048 (emphasis supplied). It must, however, be more than an acquiescence to a claim of lawful police authority. *Bumper v. North Carolina*, 391 U.S. 543, 548-549, 88 S.Ct. 1788, 1792, 20 L.Ed.2d 797 (1968).

In this case, the record reveals that Petitioner's girlfriend, Miriam Montanez, gave a voluntary consent to search the house before the police applied for the warrant. There can be no question that she had authority to do so, for she was a co-inhabitant who paid the rent. *United States v. Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). Likewise, the

facts show that her consent was voluntary. It was obtained after all guns were holstered and without the use of threats or coercion. This is not a situation like *Bumper* where permission was given only after the officer claimed authority to search the home under a warrant. *Id.*, 391 U.S. at 546-547 and 550, 88 S.Ct. at 1790-1792. The only evidence of coercion came from a defense witness whose testimony the trial court expressly discredited. *Cf. State v. Alayon*, 459 N.W.2d at 330-331. See also Petition, P.P. B-10 to B-11.

In reversing the Minnesota Court of Appeals on this issue, the Supreme Court was merely correcting an erroneous scope of review that the former had utilized by substituting its own fact-finding using the testimony of the discredited witness. This is hardly the type of issue in which this Court needs to become involved.

Petitioner's permission to search was obtained after consent was given by Ms. Montanez. Thus, it is not critical whether it was given after an illegal arrest because hers alone will suffice to uphold the search. See Petition, P. 9. Moreover, as previously discussed, Petitioner was not subjected to an illegal arrest in the doorway. Additionally, the mere fact that he may have been in custody is not enough, by itself, to demonstrate a coerced consent. *United States v. Watson*, 423 U.S. 411, 424, 96 S.Ct. 820, 828, 46 L.Ed.2d 598 (1976).

4. Petitioner's Statements

Although not discussed in detail by the Minnesota Supreme Court, the admission of Petitioner's statements do not provide any basis for certiorari. See Petition, P.P. 9-10.

Petitioner plainly received an adequate *Miranda* warning that covered each of the four essential points and he has cited

no facts to the contrary. There is no question that the warnings reasonably conveyed to him the rights required by *Miranda* so that there has not been any constitutional violation. *Cf. Duckworth v. Eagan*, 492 U.S. ——, 109 S.Ct. 2875, 2880, 106 L.Ed.2d 166 (1989). Moreover, the officer explained it carefully and answered Petitioner's questions before obtaining the waiver.

The waiver was also voluntary because Petitioner fully understood his rights. Though Hispanic, he conversed in English without the assistance of an interpreter.

Petitioner's confession was likewise voluntary because no threats, promises or intimidation were used to obtain the admissions. By this time, the officers' guns had been put away, Petitioner was allowed to stand up without any form of restraint, and he fully cooperated with the police. This Court has made it clear that some form of coercive police activity is required to invalidate any confession claimed to be involuntary. *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). Finally, suppression of the statements was not mandated because they were the product of of an illegal arrest. See Petition, P. 10. As previously discussed, Petitioner simply was not illegally arrested in the doorway by the officer.

In summary, this case does not involve any conflicting decisions or novel principles of law. The decision below clearly turns upon its own facts and will affect few other litigants. The Minnesota Supreme Court has not misconstrued the meaning of the Fourth Amendment because the decision below is plainly correct. Thus, there is no reason why certiorari should be granted.

CONCLUSION

For the reasons stated herein, the Petition For A Writ of Certiorari should be denied.

Respectfully submitted,
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